Filed 9/29/09 P. v. Chatman CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LELAND DOMINIC CHATMAN, Defendant and Appellant.	B202934 (Los Angeles County Super. Ct. No. NA073807)
In re LELAND DOMINIC CHATMAN on Habeas Corpus.	B213024

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles D. Sheldon, Judge. Affirmed in part and reversed in part.

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Petition denied.

Kenneth J. Hutz, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Leland Dominic Chatman guilty of one count of criminal threats, in violation of Penal Code section 422, and one count of possession of a firearm by a felon with prior convictions, in violation of section 12021, subdivision (a)(1).[1] The jury also found that Chatman used a firearm in connection with the criminal threats count, in violation of section 1203.06, subdivision (a)(1), and that Chatman committed both offenses for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, and assist in the gang's criminal conduct, in violation of section 186.22, subdivision (b)(1). Chatman was sentenced to 10 years in prison.

In this appeal Chatman argues with respect to the findings on the gang enhancements that (1) insufficient evidence supported the findings on the gang enhancements; (2) the trial court made several errors in its instructions to the jury; (3) he was improperly held to answer on the gang enhancements at the preliminary hearing; (4) the trial court erred in allowing certain types of testimony by a gang expert; and (5) the predicate acts required for imposition of the gang enhancements were not proved.

With respect to the verdicts on the underlying crimes, Chatman argues that the jury convicted him of those crimes based on the prejudicial admission of inadmissible gang evidence and that this resulted in federal constitutional error, cumulative error, and an unfair trial, requiring reversal.

Finally, both in Chatman's petition for a writ of habeas corpus and on appeal he argues that his counsel provided ineffective assistance. He claims in the habeas petition that trial counsel erroneously failed to object at trial to the admission of gang evidence. He repeats this claim on appeal and adds that counsel erroneously failed to make a section 995 motion to exclude the gang evidence. He contends these omissions caused the jury to convict him of the underlying offenses.

---

[1] Unspecified statutory references are to the Penal Code.

We agree that insufficient evidence supported the findings on the gang enhancements. We therefore reverse Chatman's five-year sentences on the gang enhancements. We do not reach the remainder of Chatman's arguments concerning the findings on the gang enhancements because they are rendered moot by our decision on the sufficiency of the evidence, as is the petition for a writ of habeas corpus, which addresses ineffective assistance of counsel with respect to the gang enhancements. As to Chatman's remaining contentions that (1) he was prejudiced by ineffective assistance of counsel by virtue of counsel's failure to make a section 995 motion to exclude the gang evidence or to object at trial to the gang evidence and (2) the trial was fundamentally unfair, both lack merit. Consequently, we affirm the convictions on the underlying crimes.

BACKGROUND

Chatman was charged with one count of making criminal threats, in violation of section 422 (count 1), and one count of possession of a firearm by a convicted felon, in violation of section 12021, subdivision (a)(1) (count 2). The information charged that each offense was committed for the benefit of a criminal street gang "with the specific intent to promote, further and assist in criminal conduct by gang members" pursuant to section 186.22, subdivision (b)(1). The information also charged that Chatman used a handgun in the commission of count 1 and that he had suffered four prior felony convictions, including three prior convictions for which he served a prison term. Chatman pleaded not guilty and denied all of the special allegations.

Long Beach Police Detective Zamora testified at the preliminary hearing as an expert on gangs. He provided information about the Insane Crips gang and its primary activities. He had personally interviewed police personnel concerning their prior contacts with Chatman. He opined that Chatman was an active member of the Insane Crips based on his "self-admittance, who he has been arrested with, who he has been known to congregate with as well as the crimes he has been arrested for." He had been arrested in the company of documented Insane Crips members numerous times related to firearms

(one of the Insane Crips's primary activities). At the time of one arrest, he had "the I.D. of a high-ranking Insane Crips gang member" in his possession. At the time of another arrest, he was with four "self-admitted" Insane Crips gang members. His arrests were in Insane Crips territory. Chatman had a tattoo that had a "gangster look." The conditions of Chatman's parole included that he not associate with Insane Crips gang members. Zamora testified to "predicate priors" by other active Insane Crips members. He responded to a hypothetical based on the facts of the case that a gang member yelling the words attributed to Chatman would be acting "in association with, at the direction of or for the benefit of the criminal Insane Crip gang" and stated reasons for his opinion, including the desire to instill fear in the community.

At the commencement of trial, Chatman admitted his four prior felony convictions for purposes of the count alleging a violation of section 12021, subdivision (a)(1) (possession of a firearm by a felon with prior conviction). The court informed the jury that Chatman had admitted a felony conviction.

At trial, Shellia Walker testified that on the morning of March 10, 2007, she went to take care of her paraplegic mother, Shelly Walker, at her mother's apartment in Long Beach.[2] When Shellia arrived, Hank Chatman, Shelly's boyfriend and defendant Chatman's father, was there. Hank and Shelly had been together for about eight years. Shellia was not fond of Hank, and Hank was not crazy about Shellia. Hank and Shellia got into a physical altercation. Hank called the police, who arrived in due course.

Meanwhile, Shellia called her grandmother, Shelly's mother Jenette McGuirt, asking her to bring over eviction papers in which Shelly sought to remove Hank from the apartment. McGuirt arrived with the papers, Shelly asked Hank to leave, and he was served with the papers and agreed to leave.

Hank called his sons, Henry Chatman III and defendant Chatman. They arrived, helped Hank collect his things, and left, as did the police.

---

[2] For clarity, we use the first names of some witnesses. We intend no disrespect thereby.

Five to 10 minutes after the police left, Shellia heard a loud bang at the door. She saw Chatman's foot kicking a hole in the lower part of the locked security door. Shellia could see Chatman and another man outside the door. Chatman said loudly, "'Insane Crip. All of you bitches come outside. I've got something for all three of you all.'" He was holding a gun across his torso and was moving erratically. The other man held a tire iron, raising it up as Chatman spoke. Shellia knew that Insane Crips was a street gang. She testified, "I was threatened. I took it to mean as though he was a gang member."

After several minutes, McGuirt told Shellia to call the police, and the two men ran off. A policewoman responded to Shellia's call. As Shellia was telling the officer what had happened, Chatman called on Shelly's phone, and Shellia answered. Chatman asked if it was Shellia and then said, "'I just want to let you know someone is coming over there to whoop your ass.'"

A few weeks later, Shelly called Shellia and told her it was wrong to testify against Chatman and she should forgive him and let it go because he was going to get a lot of jail time and he had a family. Shellia had not spoken with her mother since the incident but had heard from her mother's nurse that Shelly and Hank were back together. Shellia defined the relationship as "abusive." She did not spend time with Hank or his sons and did not consider them her family.

After the confrontation with Chatman, Shellia changed "[e]verything," looking around everywhere she went and changing the routes she traveled, afraid that Chatman would "have something done, or . . . have someone else do something."

Jenette McGuirt, Shelly's mother, also testified about the March 10, 2007 incident. She also did not get along with Hank. On the morning of March 10, she received a call from Shellia, who was upset and said that Hank had hit her and the police were there. Shellia asked McGuirt to bring over the eviction notice.

After McGuirt arrived, Chatman and Hank's other son, Henry, arrived. McGuirt gave an officer the eviction notice. When McGuirt told one of the officers she was not

there during the fight, Chatman said, "'Shut up, bitch.'" Hank and his sons moved Hank's things out of the apartment and left.

McGuirt went into the apartment with Shelly and Shellia. Twenty minutes later, McGuirt heard a loud noise. She saw Chatman's foot protruding through a hole in the security door and heard him holler, "'Insane Crips. All three of you bitches come out. I got something for you.'" She turned to face the door and saw that Chatman had a gun. Chatman tried to turn the doorknob, but the door was locked.

McGuirt knew that Crips was a gang but had not heard of "Insane Crips" before. When she heard Chatman shout, "'Insane Crips," she thought maybe he was a gang member with the Crips. She thought that "All three of you bitches come out. I got something for you" was a threat to harm her, Shellia, and Shelly. Chatman was moving the gun back and forth, pointing it down, and was "real jittery with that gun."

At first McGuirt was nervous and didn't know what to do, but then she told Shellia to call the police. She stood there while Shellia called. While Shellia was describing Chatman to the police, Chatman and the person with him "took off . . . like they were running track." McGuirt did not know the other man, who she later learned was a cousin, but noticed that he was looking at Chatman and the gun and was holding a silver metal tool. She thought the confrontation lasted five or six minutes, and she never moved away from the door.

The police arrived. Thereafter, Shelly and Shellia left, and McGuirt went to a locksmith to get the door lock changed. She returned to the apartment to put in the new door knob. Sometime later, about two or three hours after the confrontation at the security door, Chatman returned with Shelly in her wheelchair beside him. Shelly said to McGuirt, "'Oh, Mama, Leland [Chatman] had talked to me, and he really don't want you to press charges against him, and he will pay you.'" Shelly added that she had told Chatman that McGuirt would not accept money. Chatman, holding a bouquet of flowers, got down on his knee and apologized to McGuirt, saying, "'I'm on parole. I can't afford

to go to jail anymore, and would you please forgive me.'" McGuirt told Chatman she did not want to talk to him and that she would call the police again. Chatman left.

McGuirt said she did not know Chatman well and did not have a family relationship with him. McGuirt explained that while she had a pretty good relationship with Shelly, she was not talking to her presently because since about two weeks after the March 10 incident Shelly had been pressuring McGuirt not to prosecute Chatman, calling McGuirt and leaving messages on her phone. But McGuirt was going ahead because, "I am afraid for my life. Leland pulled a gun on me. Okay. And that's why I am doing what I do. I have to stand up for my rights." Since the incident, McGuirt always checked to see if she was being followed and had installed security cameras and an alarm system at her home. For the first time in many years, she received a Mother's Day card from Shelly, asking her to forgive Chatman.

Long Beach Police Officer Fernando Cook testified that when he arrived at the apartment on March 10, 2007, in response to a 911 call to the police, Hank was outside and was having trouble breathing. He gave Hank the eviction papers, and Hank agreed to leave. Chatman, Henry, and the third young man arrived. Cook stated that Chatman was upset about his father's problems with Shelly. The officers left soon after Hank left with his sons.

Officer Cook and his partner were called back a short time later as a result of a "man with a gun" call. Shellia told them Chatman had returned with another man, threatening her and brandishing a gun. She showed them the hole in the security door and told Cook that Chatman had kicked in the door.

Long Beach Police Detective Hector Gutierrez testified that he had been assigned to the gang division for 14 years, with special training in gangs and gang culture. Detective Gutierrez had investigated the Insane Crips for 17 years. The gang had 1,135 documented members and was involved in "murder, murder for hire, robberies, narcotic sales, sales of assault weapons, sales of rifles and firearms, identity theft, auto theft, and vandalism." Their territory was in Long Beach. Detective Gutierrez believed that

Chatman was a member of the Insane Crips gang because he "self-admitted" at Shelly's apartment and had "self-admitted" a number of times to members of the gang enforcement section, he associated with other gang members, and on two or three occasions he was arrested for possession of firearms and narcotics. On one occasion, Chatman was with one of the gang's most hard-core members and a firearm was recovered.

Detective Gutierrez testified about two crimes committed by Insane Crips gang members. He explained that gang members often carried guns as protection and for intimidation and that the use of guns promoted the gang by enabling it to further its goals by committing crimes. After the prosecutor posed a hypothetical question based on the testimony of Shellia and McGuirt, Detective Gutierrez opined that a gang member behaving in that way would have had the intent to benefit and promote the Insane Crips gang. Such behavior would benefit and promote the gang because it would tend to intimidate people so they would not report the gang's criminal activities to the police.

The defense presented Maria Marquez, a neighbor of Shelly's who lived in the same small four-unit apartment complex where Shelly lived. Marquez testified that she knew Hank, Chatman, Shellia, and McGuirt. Marquez knew that there was conflict between Shellia, McGuirt, and Shelly about Shelly's relationship with Hank. Maria claimed the security door had been "torn up by [Shelly's] wheelchair" previous to March 10, 2007.

On March 10 Marquez heard the commotion, and Hank came to her house to call his sons. Sometime after Hank left, Marquez heard yelling and looked out to see Chatman at the door to Shelly's apartment. She testified that the yelling went on for 15 minutes, from outside and inside Shelly's apartment. She could see that Chatman did not have a gun. She could not understand all the yelling but was sure that both McGuirt and Shellia were yelling from inside. She heard nothing about "Insane Crips."

Shelly then testified from her wheelchair. On March 10, 2007, Shellia had arrived around 10:00 a.m. to get Shelly dressed. Hank and Shellia got into an altercation,

McGuirt brought over the eviction papers, and the police arrived. The police told Hank to leave and take his things. Shelly explained that the footrests of her wheelchair had made the tears in the security door screen before March 10.

When Chatman returned and was standing at the security door, Shelly was in her wheelchair in the living room and did not see a gun. She heard Chatman say, "'Bitches, you guys all come outside,'" "or something like that." She also heard him say something else that she did not understand, but she was sure that it was not "'Insane Crips.'" She had never had a problem with Chatman, and he was always willing to help her. She wrote the Mother's Day card to get McGuirt to forgive Chatman. She loved Chatman like her own son.

Hank's son Henry testified that he is Chatman's older brother. On March 10, 2007, he received a phone call that Hank was fighting with Shelly. When Henry arrived at Shelly's apartment, Hank was breathing hard, and the paramedics told Henry he needed to get Hank to the hospital. Henry loaded Hank's belongings into the truck and took Hank to Henry's house. Hank then wanted to go to the Veterans Administration hospital, so Chatman left Henry's house to go back to Shelly's apartment to get Hank's identification card, while Henry took Hank to the hospital. Henry testified Chatman was not a gang member and did not own a gun. When the police arrested Chatman, they searched the house and found no guns.

In closing argument, the prosecutor argued that the case "comes down to who you believe" about the events on March 10, 2007. Family tensions had been present for years, but on March 10 things changed because "the defendant threatened Shellia and her grandmother [McGuirt] with a handgun. . . . [S]he took it as a threat, a threat against her life and her grandmother's life." When Chatman threatened the women they were in fear "because of the words that he uttered. [¶] . . . [S]omebody is actually holding a handgun, when somebody has kicked a hole through a door. When somebody has done this after you have gotten into an argument with somebody who is closest to the person holding the gun, what do you take those words to mean? 'Insane Crips. All you bitches come out

here. I have got something for you.' [¶] Ladies and gentlemen, that is a direct threat against somebody's personal safety, and against their life. And you heard from both Shellia and [McGuirt] that is what they feared for. The interesting thing is, that fear continues today. [¶] . . . Why? Because they're not sure whether the defendant has told any of these other gang members or anyone else to get them."

The prosecutor then listed the elements of the gang allegation. He acknowledged he first had to prove that the gang existed. He then asked, "How do you know that what the defendant did on that day was in furtherance of a gang?" and in response referred to Detective Gutierrez's testimony that Chatman's possession of a gun and his language intimidated people. "'Insane Crips.' The stigma and the intimidation that comes from those words and those actions serves to intimidate the community and it serves to build up a gang. That's how it is in furtherance of the gang." Chatman had returned to the apartment with a gun to threaten the people who caused his father pain, saying, "'Insane Crips.' Again, that's a threat in and of itself because of what gangs represent." The evidence pointed to Chatman's guilt on the counts of criminal threats and felon in possession of a handgun, and "also points to that defendant being guilty of both gang allegations."

Defense counsel argued in closing that "this case was about a family squabble" and the question was credibility, or "[w]ho had the motive to fabricate the truth." Counsel reviewed Shellia's and McGuirt's problems with Hank and argued that they wanted to end his relationship with Shelly. He stated that Marquez's testimony was proof "[t]hat gun does not exist" and that Chatman did not yell "Insane Crips." Shelly also testified that she did not see a gun or hear "Insane Crips." Counsel admitted that "yes, there was some profanity used." He would not deny that "Insane Crips do bad things" but argued that there was no need for the jury even to get to the gang allegation if the jury did not believe Shellia's and McGuirt's testimony about the gun or Chatman's use of the words "Insane Crips." "The gang allegation is thrown on as a special allegation to try to make matters worse for my client." The case came down to two

different stories told by two groups of people with opposing motives, with Shellia and McGuirt motivated to "do anything to sabotage this relationship . . . and that's the story that they're sticking with."

In rebuttal, the prosecutor pointed out that neither Shellia nor McGuirt knew much about gangs and yet both mentioned that Chatman yelled "Insane Crips." Detective Gutierrez had testified that Chatman had self-admitted membership in the Insane Crips and that Chatman hung out with one of the gang's most dangerous members.

The jury returned a verdict of guilty on both substantive counts. The jury also found true the use of the weapon and the gang allegations. The verdict forms for both counts included the following: "We further find the allegation pursuant to Penal Code Section 186.22(b)(1)(B) that the above offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members to be true." The judgment included an enhancement for each substantive count under section 186.22, subdivision (b)(1).[3]

At sentencing, the court denied probation and imposed a total sentence of 10 years in prison. On count 1, Chatman's two-year sentence for criminal threats was increased by three years for the use of a gun pursuant to section 1203.06, subdivision (a)(1), and by five years for the gang allegation pursuant to section 186.22(b)(1)(B). On count 2, his two-year sentence for possession of a firearm by a convicted felon was increased by five years for the gang allegation pursuant to section 186.22(b)(1)(B) and was to run concurrently.

In connection with his petition for a writ of habeas corpus, Chatman filed a declaration signed by his trial counsel that stated in pertinent part: "I attempted to defend Mr. Chatman against the substantive gang crime of 'active participation' in a criminal

---

[3] For ease of reference, we sometimes hereafter refer to section 186.22, subdivision (b) as "section 186.22(b)" and similarly abridge other references to section 186.22.

street gang (Pen. Code, § 186.22, subd. (a)) that jurors were instructed with. [¶] . . . I did not attempt to defend Mr. Chatman against the gang enhancement (Pen. Code, § 186.22, subd. (b)) that was alleged on the information." In other words, trial counsel mistakenly believed throughout his representation of Chatman that he was defending against a charge of a substantive crime under section 186.22(a) rather than a sentencing enhancement under section 186.22(b)(1). Sections 186.22(a) and 186.22(b)(1) have different elements.

DISCUSSION

1. The findings on the gang enhancements must be reversed because the prosecution failed to prove the offenses were committed for the benefit of and with the specific intent to promote or further the interests of a criminal street gang.

We review the claim of "insufficient evidence by examining the entire record in the light most favorable to the judgment below. [Citation.] We review to determine if substantial evidence exists for a reasonable trier of fact to find the counts against the [defendant] true beyond a reasonable doubt." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) "Substantial evidence must be reasonable, credible, and of solid value. [Citation.] We also presume the existence of every fact the [jury] could reasonably deduce from the evidence . . . ." (*Ibid.*) We conclude that the findings on the gang enhancements were not supported by substantial evidence, requiring reversal.

For the enhancements to apply, the People were required to prove, inter alia, that the underlying crimes were committed "[1] for the benefit of, at the direction of, or in association with any criminal street gang, [2] with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22(b)(1).)

In searching for ways the crime meets the dual requirements of the enhancement, we find nothing that would *directly* have benefitted or promoted the gang's principal activities (murder, robbery, narcotics, weapons, etc.). Thus, the only plausible nexus between Chatman's conduct and the gang's objectives was the type of community intimidation described by Detective Gutierrez.

The intimidation here does not appear to have been directed to the community at large. It was broadcast to a relatively small number of people — three women who had a personal connection with Chatman's father. No one else except a neighbor in the small four-unit apartment complex was alleged to have heard the words. (She denied hearing them.) Consequently, yelling the words attributed to Chatman would not have been calculated to achieve any significant level of community intimidation and would have been useful only in furthering Chatman's personal objectives of avenging or deterring ill treatment of his father or venting his anger. In fact, by yelling "Insane Crips," Chatman used the gang to promote his personal objective of terrorizing the three women as much as possible.[4]

After the incident, Chatman returned and apologized on bended knee with a bouquet. This conduct would not have been expected of a gang member whose specific intent was to instill fear into the community. We dare say that a gang member found by his peers to have acted in this way might well have been expelled from the gang for undermining the gang's reputation for violence. (See *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1503 [expert testified "respect is 'everything' to a gang member" and disrespect requires retaliation].)

The fact that the person who perpetrates a crime happens to be a gang member does not establish that the crime itself was committed with the specific intent to promote the gang or further its objectives. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 623–624; *People v. Albarran* (2007) 149 Cal.App.4th 214, 221, 227; *In re Frank S., supra,*

---

[4] Because the reference to the Insane Crips gang was helpful only in furthering Chatman's private purposes, this case is the opposite of *People v. Margarejo* (2008) 162 Cal.App.4th 102, 109–110, where a gang member led police on an 18-minute high-speed car chase, continuously laughing and flashing gang signs out the driver's window to the police and numerous members of "the public at large," turning the "pursuit into a reckless attention-getting parade," demonstrating the gang's indifference to law enforcement efforts to control its activities. In that case, the court concluded that the defendant's startling conduct was calculated to benefit the gang rather than to facilitate his personal objective of escape from the police.

141 Cal.App.4th at pp. 1196, 1199 [section 186.22(b)(1) "does not criminalize mere gang membership" without proof of the predicates for the enhancement; membership in a gang alone does not prove a specific intent to promote criminal conduct by gang members]; *People v. Martinez* (2004) 116 Cal.App.4th 753, 761.) Gang members can commit crimes for personal reasons. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [gang members can commit crime "on a frolic and detour unrelated to the gang"].)

The evidence of specific intent to further the activities of the gang was limited to Detective Gutierrez's testimony that conduct by gang members that intimidates the community can further the objectives of the gang and can be done with the specific intent to do so. We accept this premise.

But there was no evidence in this case of any of the other common indicia of intent to further gang objectives such as participation by multiple gang members (*People v. Morales*, *supra*, 112 Cal.App.4th at pp. 1197–1198), actions directed at rival gang members (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 622; *People v. Romero* (2006) 140 Cal.App.4th 15, 17–18), the suspicion by the perpetrator that the victims are rival gang members (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1190 ["'where are you from?'"]), the public or repeated flashing of gang signs to strangers (see, e.g., *People v. Margarejo*, *supra*, 162 Cal.App.4th at pp. 105–106), the wearing of gang clothing, a concern with protecting gang territory from intruders, whether gang-affiliated or not (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 615, 619), retaliation for a gang-related precipitating event (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 484–485), or evidence of planning or approval by other gang members (see, e.g., *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931). Nor was there any contention that the victims had "disrespected" any gang member, subjecting themselves to an etiquette lesson in the treatment of gang members. (See, e.g., *People v. Hill* (2006) 142 Cal.App.4th 770, 772.)

While none of these is required, under all of the circumstances, the evidence that Chatman acted for the benefit of the gang with the specific intent to promote, further, or assist in criminal conduct by gang members is insufficient to allow a reasonable juror to

find the elements of the enhancements beyond a reasonable doubt.[5] Reduced to its basics, the evidence here is limited to an angry gang member trying to frighten people he knows and wants to frighten for personal reasons and using the gang name to help in his personal quest to frighten them as thoroughly as possible. Gang members can and do commit crimes for personal reasons not intended to promote the gang. (*In re Frank S.*, *supra*, 141 Cal.App.4th at pp. 1196, 1199; *People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198.) While it is possible that Chatman acted to promote the gang through intimidating these women, the evidence was insufficient to support such an inference beyond a reasonable doubt. The mere possibility that Chatman might have possessed the requisite intent to promote the gang is insufficient. (*People v. Ramon* (2009)175 Cal.App.4th 843, 853.)[6]

2. By failing to object at trial, Chatman waived his complaint that the admission of certain gang evidence rendered his trial on the underlying crimes unfair, and in any case, most of the evidence was admitted properly.

Chatman argues that the admission of certain gang evidence was improper and that it rendered his trial on the underlying crimes (criminal threats and felon in possession of a firearm) unfair. He contends that none of the gang evidence should have been admitted because of deficiencies in the evidence adduced at the preliminary hearing and because various components of the gang evidence were inadmissible, insufficient, or unduly prejudicial. We examine the items of evidence objected to in turn.

---

[5] We do not know that the jury ever made such a finding, as it was given the wrong jury instruction, which did not instruct the jury that it was required to find the elements of section 186.22(b)(1) beyond a reasonable doubt. Similarly, trial counsel did not realize that an enhancement under section 186.22(b)(1) was charged and consequently did not argue about its elements.

[6] Chatman's contentions concerning the section 186.22(b)(1) enhancements, set forth in the appeal and the habeas petition, are mooted by our determination that the findings on the enhancements were not supported by substantial evidence. Consequently, we do not discuss them.

Chatman claims the gang evidence adduced at his preliminary hearing was insufficient to hold him to answer on the gang enhancements, so that none of the gang evidence should have been admitted at trial and its admission tainted the verdict on the underlying crimes. In particular, Chatman complains that the expert testifying at his preliminary hearing did not establish adequately that Chatman would have possessed the specific intent to promote the gang's objectives because that expert did not specifically say he did. Then Chatman argues in a "Catch 22"-like manner that, if the expert had done so, the testimony would have been inadmissible because it would have been improper for the expert to opine on Chatman's own intent.

To preserve this issue for appeal, Chatman was required to make a section 995 motion to challenge the section 186.22(b)(1) enhancements. He did not. The objection therefore was not preserved for appeal. Recognizing this error, Chatman claims in his appeal that failure to make the section 995 motion constituted ineffective assistance of counsel. We reject this contention in part 3 on ineffective assistance of counsel, *post*, noting that the evidence adduced at the preliminary hearing was adequate to hold Chatman to answer on the gang enhancements.

Chatman's next complaint about the gang testimony is that Detective Gutierrez testified at trial that a hypothetical gang member behaving in the way Chatman was alleged to have behaved would have possessed the specific intent to promote the interests of the gang. Chatman argues that Detective Gutierrez was testifying about Chatman's own state of mind, a matter beyond Gutierrez's expertise and an invasion of the province of the jury. Chatman did not object to this testimony at trial.

Even if he had, the testimony would have been admissible. The hypothetical did not impermissibly elicit Gutierrez's opinion of Chatman's own state of mind as was the case in *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657–658. It properly elicited an expert opinion as to the conduct and intent to be expected of hypothetical gang members in general when confronted with a specific situation. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946–947 [*Killebrew* merely prohibits "'an expert from testifying to his or

her opinion of the knowledge or intent of a defendant . . . .' [Citations; fn. omitted.] Even if we assume, without deciding, that *Killebrew* is correct in this respect, it has no relevance here. [The gang expert] merely answered hypothetical questions . . . . 'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth."'"]; *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 617–619 [hypothetical questions based on facts of case permissible and expert can be asked if actions are "gang-related activity" done "for benefit of" the gang for purposes of section 186.22(b)(1); experts may testify as to bases of such opinions even if otherwise inadmissible]; *People v. Killebrew*, *supra*, 103 Cal.App.4th at pp. 656–658 [improper expert gang testimony as to the subjective knowledge and intent of individual occupants of cars is distinguishable from permissible expert gang testimony as to "*expectations* of gang members in general when confronted with a specific action"]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370–1371 [evidence of gang psychology and sociology is proper expert testimony about what gang members would typically expect and was not improper testimony about the defendant's own subjective expectations].)

Nor was the admission of the gang expert's opinion as to the hypothetical an abuse of discretion under Evidence Code sections 352 and 1101, subdivision (a), which objections Chatman now seeks to raise for the first time. The evidence was relevant to the elements of the underlying count of violation of Penal Code section 422, which the prosecution was obliged to prove beyond a reasonable doubt. It was relevant to whether Chatman willfully conveyed a threat of death or great bodily harm with the specific intent that it be taken as such and the effect of the threat on the victims. In addition, it was relevant to Chatman's motive to promote the gang's interests. Such evidence is admissible when a gang enhancement has been alleged. (*People v. Williams* (1997) 16 Cal.4th 153,193–194; *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 618–620.) This is so even if such evidence is prejudicial. (*People v. Martin* (1994) 23 Cal.App.4th 76, 81.)

Chatman also asserts that the evidence that certain predicate crimes were one of the "primary activities" of the gang was insufficient. Again, the objection was not raised at trial and is ill-founded. Detective Gutierrez testified from personal experience with the Insane Crips that members of the Insane Crips were "involved with murder, murder for hire, robberies, narcotic sales, sales of assault weapons, sales of rifles and firearms, identity theft, auto theft, and vandalism." The prosecutor also submitted certified minute orders reflecting robbery and grand theft convictions of two Insane Crips members for predicate crimes committed during the prescribed time period. This was sufficient.

Objections to the foregoing evidence were not made in a timely manner and, at any rate, the evidence was not admitted improperly.

3. Chatman's conviction on the underlying crimes is not reversible for ineffective assistance of counsel because there was no prejudice.

Chatman's petition for a writ of habeas corpus addresses ineffective assistance of counsel only in the context of the gang enhancements. Because we reverse that portion of Chatman's sentence, his petition is moot. Consequently, we deny the petition.

Chatman's appeal also raises ineffective assistance of counsel, both in the context of the findings on the gang enhancements and on the theory that counsel's ineffective assistance caused the jury to convict him of the underlying crimes, to his prejudice. Again, the argument is moot as to the sentence on the gang enhancements.

With respect to the argument that ineffective assistance of counsel caused his convictions on the underlying crimes, Chatman argues that his attorney should have (1) filed a section 995 motion to exclude gang evidence from the trial; (2) objected at trial to the admission of the gang evidence discussed in part 2, *ante*; and (3) objected to Gutierrez's testimony that Chatman had been contacted previously by law enforcement and had been arrested previously.

"In order to prevail on [an ineffective assistance of counsel] claim defendant must prove (1) his attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) his attorney's

deficient representation subjected him to prejudice. [Citations.] Prejudice for purposes of this analysis is demonstrated by showing a reasonable probability that, but for trial counsel's failings, the result would have been more favorable for the defendant. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Cain* (1995) 10 Cal.4th 1, 28.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant . . . . If it is easier to dispose of an ineffectivenesss claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [104 S.Ct. 2052]; accord, *In re Fields* (1990) 51 Cal.3d 1063, 1079.) It is well established that an attorney's failure to object to evidence does not constitute ineffective assistance of counsel when there is "no sound legal basis for objection." (*People v. Cudjo* (1993) 6 Cal.4th 585, 616; *People v. Majors* (1998) 18 Cal.4th 385, 403.)

a. Failure to make a section 995 motion to exclude gang evidence

Chatman argues that the evidence supporting the gang enhancements adduced at the preliminary hearing was not sufficient to hold him to answer on the enhancements and that his counsel provided ineffective assistance when he failed to make a section 995 motion to exclude all gang evidence from trial.

Under section 872, subdivision (a), if "it appears . . . that a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty," the defendant shall be held to answer. Only a reasonable probability of guilt need be shown; it is not necessary to produce evidence that would support a verdict of guilty. "'Reasonable or probable cause'" is frequently defined as "a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." (*People v. Nagle* (1944) 25 Cal.2d 216, 222.) "[E]very legitimate inference that may be drawn from the evidence must be drawn in favor of the information." (*People v. Dickinson* (1976) 59 Cal.App.3d 314, 320–321.)

Here, McGuirt testified at the preliminary hearing that Chatman threatened her, Shelly, and Shellia by saying, "Insane Crip. All you three bitches come out. I got something for you," while holding a gun. The gang expert who testified at the preliminary hearing testified about Chatman's active membership in the gang, prior law enforcement contacts as a gang member, self-identification as a gang member, the Insane Crips's primary criminal activities, predicate crimes by other members of the gang, and the gang's signs, territory, and membership. He also responded to a hypothetical question based on the facts by concluding that someone who behaved in the way described was committing the crime in association with, at the direction of, or for the benefit of the gang.

The facts adduced at the preliminary hearing "would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused" (*People v. Nagle*, *supra*, 25 Cal.2d at p. 222) of all elements of the enhancements. Thus, contrary to Chatman's argument, there was no viable basis for a section 995 motion to exclude from trial the evidence supporting the gang enhancements, and counsel's failure to make the motion was not prejudicial.

b. Failure to object to the admission of the gang evidence discussed in part 2, *ante*

Because Chatman was properly held to answer for the enhancements, the People were entitled to attempt to prove the enhancements with admissible gang evidence. The evidence as to the activities of the Insane Crips, their predicate crimes, Chatman's relationship to the gang, and the hypothetical posed to the expert were all properly admitted. As the gang evidence discussed in part 2, *ante*, was received properly, the failure to object to it did not constitute ineffective assistance of counsel.

We also note that additional evidence which told the jury that Chatman might be a member of the Insane Crips gang was properly admitted when Shellia and McGuirt testified that Chatman yelled "Insane Crips" and that they were fearful because they knew Insane Crips was a gang. This evidence would have been admitted in any case.

Given that the jury would have known from this evidence about Chatman's alleged affiliation with the Insane Crips, we cannot say the expert testimony would have had a substantial incremental prejudicial effect on the jury.

Finally, the jury was given an instruction advising it that gang evidence unrelated to the crimes charged could not be considered to prove that Chatman committed the substantive offenses. The admission of the gang evidence did not unduly prejudice Chatman.

c. Failure to object to Gutierrez's testimony about prior law enforcement contacts and arrests

Chatman claims his attorney should have objected to Detective Gutierrez's testimony about Chatman's prior contacts with law enforcement and prior arrests. The testimony at issue is as follows: "Also the fact that he has been contacted numerous times by members of my gang enforcement section where he either self-admitted, he was associated, hanging out, and two or three of the occasions he was arrested for possession of firearms and narcotics." Gutierrez testified that during one of those contacts Chatman was in the company of Don Akron, a hard-core member of the gang.[7]

---

[7] There is a threshold issue as to whether Chatman's counsel ever objected to this testimony. Initially, when the testimony was elicited, Chatman's counsel did not object. Well after the testimony came in, a side-bar discussion was held as a result of Chatman's objection to the relevance of evidence of convictions of fellow gang members elicited to establish predicate crimes committed by the gang. During that side-bar discussion, Chatman's counsel belatedly complained about Gutierrez's testimony concerning Chatman's prior law enforcement contacts and arrests. He claimed the prosecutor had agreed before trial not to allow Gutierrez to testify about arrests and contacts with police. The prosecutor denied that there was such an agreement and said the only agreement was not to elicit testimony about Chatman's convictions.

Chatman's counsel did not frame his statements as an evidentiary objection — just as a complaint about a violation of an agreement that the prosecutor denied making. He did not assert that the admission of evidence of contacts or arrests violated Evidence Code sections 352 or 1101, subdivision (a), as he does now.

After the jury was excused for the day, the court gave trial counsel another chance to tell the court about any objections to the expert testimony that he might have wanted to

When Detective Gutierrez testified about Chatman's prior law enforcement contacts and arrests, it did not come as any surprise to the jury. The jury was informed he had been convicted of a felony. In proving the underlying crime, the People elicited testimony about what Chatman said at the scene. When he returned to apologize, he told McGuirt, "I'm on parole. I can't afford to go to jail anymore . . . ."

In sum, without Gutierrez's testimony that Chatman had had prior law enforcement contacts and arrests, the jury still knew from other admissible evidence that Chatman was a convicted felon associated with the Insane Crips gang who had been in jail and was on parole. In light of this, we conclude that any testimony from Gutierrez that there had been prior law enforcement contacts and arrests did not have any prejudicial impact.

We conclude that Chatman did not suffer prejudice from any ineffective assistance of counsel that may have occurred and that the result would not have been more favorable to Chatman if counsel had made the objections Chatman claims he should have made.

4. Chatman's claim that there was federal constitutional error and cumulative error resulting in an unfair trial and requiring reversal of the convictions on the underlying crimes is unfounded.

Chatman contends that the erroneous admission of the gang evidence and his counsel's failure to object thereto was so serious as to violate his federal constitutional rights to due process, rendering his trial fundamentally unfair. Under *Chapman v. California* (1967) 386 U.S. 18, 24 [89 S.Ct. 824],"in the case of a deprivation of federal due process, reversal is required unless the state can prove beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Albarran*, *supra*, 149

---

make at the earlier side-bar discussion. Chatman's counsel did not object to anything but the evidence of the predicate crimes.

The complaint at side-bar did not constitute a timely objection, or indeed any objection. We therefore proceed to the issue of ineffective assistance of counsel.

Cal.App.4th at p. 229.) To prove deprivation of federal due process, the defendant "must satisfy a high constitutional standard . . . ." (*Ibid.*) "'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.] 'The dispositive issue is . . . whether . . . [the] error . . . rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citation.]'" (*Id.* at pp. 229–230.)

As is discussed above, the error here as to the underlying crimes, if any, is limited to the admission of Gutierrez's testimony about Chatman's prior law enforcement contacts and arrests. We conclude that the prosecution has proved beyond a reasonable doubt that any such error did not contribute to the verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

DISPOSITION

The Penal Code section 186.22, subdivision (b)(1)(B) enhancements are reversed. In all other respects, the judgment is affirmed.

Chatman's request for judicial notice of the appellate record in B202934 is granted. The petition for a writ of habeas corpus is denied as moot.

NOT TO BE PUBLISHED.

MALLANO, P. J.

I concur:

CHANEY, J.

MILLER, J.,* Concurring.

I agree with the majority's reversal of the gang enhancements under section Penal Code section 186.22, subdivision (b)(1),[1] but for a different reason. I believe sufficient evidence supports the jury's findings, but I would reverse the enhancements for instructional error.

A gang member standing outside an apartment "yelling" "Insane Crips" while brandishing a gun and kicking in a door could have been found by a reasonable jury, beyond a reasonable doubt, to have been acting for the benefit of the gang with the specific intent of spreading fear of the gang in the community. By calling out the gang name, Chatman warned his victims, as well as anyone in earshot, that if a person treated the father of an Insane Crips gang member disrespectfully, that person would have to contend with the Insane Crips gang. Chatman did not limit himself to a purely personal threat. He injected the Insane Crips gang into the situation by calling out the gang name, warning anyone who could hear him that it was not just Chatman, but the Insane Crips gang, which would back up his armed threat. The jury could have concluded that the use of the gang's name took Chatman's actions beyond the realm of a purely personal threat and into the territory proscribed by section 186.22(b)(1).

That Chatman may *also* have intended to promote his personal agenda does not negate his concurrent intent to intimidate community members on behalf of the gang. The statute does not require that his *sole* intent be to promote the gang. Gang members regularly act with concurrent intentions, for instance, to obtain money to line their own pockets through robbery, while instilling fear of the gang for the benefit of the gang.

---

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] For ease of reference, Penal Code section 186.22, subdivision (b)(1) will be referred to as "section 186.22(b)(1)" and Penal Code section 186.22, subdivision (a) will be referred to as "section 186.22(a)."

Nor does the statute require that the gang member achieve substantial success in his attempt to benefit the gang. Thus, the fact that Chatman's voice reached only a few people, and did not succeed in intimidating more members of the community, is not disqualifying.

The analysis of his postcrime conduct is similar. Although his apology on bended knee was not the sort of thing encouraged by the Insane Crips, his ineptitude as a gang member is not disqualifying. In fact, Chatman succeeded in intimidating Shellia and McGuirt, who testified that they thought he might be a gang member and feared that he might send "someone else" to harm them. As a result, they began looking over their shoulders to see if they were being followed, changing their routines, and in McGuirt's case, installing security cameras and an alarm system at home.

Nevertheless, I would reverse the findings on the gang enhancements for instructional error because the trial court gave the jury the wrong instruction on the enhancement. The court gave a modified version of CALJIC No. 6.50, which describes the substantive crime set forth in section 186.22(a), rather than the enhancement described in section 186.22(b)(1). Subdivision (a) provides for various terms of imprisonment for "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ."

The enhancement set forth in section 186.22(b)(1), and charged in this case, differs from the substantive crime described in section 186.22(a) in several important ways. Most significantly, section 186.22(b)(1) requires that the crime be done "for the benefit of, at the direction of, or in association with any criminal street gang . . ." and "with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

CALJIC No. 6.50, which was the instruction the court gave, did not tell the jury that these elements of section 186.22(b)(1) had to be found true beyond a reasonable

doubt. It told the jury it was required to find elements of section 186.22(a) instead. The giving of various other instructions did not cure the absence of the critical instruction, which is normally given in the form of CALJIC No. 17.24.2. This instructional error was not harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824], as the jury was never told it was required to find the elements of section 186.22(b)(1) true beyond a reasonable doubt and may not have done so. Consequently, reversal of the gang enhancements is required.

I agree with the remaining sections of the majority opinion.

MILLER, J.*

---

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.